No. 18-6210

IN THE

Supreme Court of the United States

GERALD P. MITCHELL,

Petitioner,

—v.—

STATE OF WISCONSIN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND ACLU OF WISCONSIN, IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.7 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU regularly participates in cases before this Court involving the right to privacy protected by the Fourth Amendment. The ACLU was counsel of record in *Missouri v. McNeely*, 569 U.S. 141 (2013) and participated as amicus curiae in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). *See also, e.g., Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Riley v. California* 134 S. Ct. 2473 (2014); *Maryland v. King*, 133 S. Ct. 1958 (2013). Because this case addresses an important Fourth Amendment question, its proper resolution is of substantial concern to the ACLU and its members.

The ACLU of Wisconsin is a statewide affiliate of the national ACLU and has approximately 13,500 members throughout Wisconsin. The protection of privacy is of special concern to the organization, which has submitted briefs in or litigated a number of state and federal cases involving the application of the Fourth Amendment. *See, e.g., State v. Sveum*, 787 N.W.2d 317 (Wis. 2010) (GPS vehicle tracking); *Belleau v. Wall*, 811 F.3d 929 (7th Cir. 2016) (GPS

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than amici curiae, their members, and their counsel, made a monetary contribution to the preparation or submission of this brief. Both parties have given their consent to this filing in letters that have been lodged with the Clerk of the Court.

ankle monitors); *United States v. Patrick*, 842 F.3d 540 (7th Cir. 2016) (cell-site simulator ("stingray") location tracking).

SUMMARY OF ARGUMENT

An unconscious person cannot freely and voluntarily consent to a search. For consent to a search to be truly voluntary, the individual providing consent must have the freedom to change her mind. The right to deny or revoke consent—whether through refusal, limitation, or withdrawal—is essential for consent to a search to be "voluntary."

An unconscious person is incapable of making a choice, and thus cannot voluntarily consent. An unconscious person also cannot change her mind, and therefore has no opportunity to revoke or amend consent as a search is being conducted. Thus, this Court has recognized that consent cannot be given where "a person is unconscious or drugged or otherwise lacks capacity for conscious choice." *Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973).

Both Fourth Amendment jurisprudence and a wide range of other legal doctrines recognize that where the authority to act rests on an individual's consent, the consent must be voluntary, and the individual must be free to make a choice *not* to consent, and to *withdraw* or *revoke* consent at any time. In the law of rape, for example, a person's consent to sexual intercourse while conscious does not authorize her partner to have sexual intercourse with her while she is unconscious. This is so even if she has expressly agreed, while conscious, to sexual intercourse while she is unconscious, precisely because she would be unable to withdraw or revoke

such consent during intercourse. Similarly, because an unconscious person cannot choose to revoke or limit her consent to be searched, she cannot be said to have consented to a search, irrespective of the circumstances of any prior consent.

The fact that by statute, Wisconsin seeks to impute what it calls "consent" to everyone who drives an automobile in the state does not alter the result. This Court has suggested that, as a matter of the state's *authority to regulate the roads*, the state may impose civil and evidentiary consequences on those who decline to submit to a blood draw. But a statutory presumption cannot determine, *as a Fourth Amendment matter*, whether an individual has in fact consented to a particular search; that inquiry must be conducted on a case-by-case, "totality of all the circumstances" basis, *Schneckloth*, 412 U.S. at 227, and requires that the individual maintains the ability to revoke or delimit consent before completion of the search. Because an unconscious person cannot make a choice at all, the state cannot constitutionally impute an irrevocable presumption of "consent" on an unconscious person merely because she has driven on the state's roads.

The harm caused by driving while intoxicated is indisputable. But Wisconsin and other states have many other adequate means to combat driving under the influence that do not require deeming unconscious individuals to have "consented" to a search that they have no opportunity to decline. For instance, this Court has held that states may require breath tests incident to lawful arrests for drunk driving. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2184 (2016). The Court has also suggested that they

may impose civil and evidentiary consequences on conscious individuals who decline blood draws, so long as the motorists remain free to choose to say no. Officers may obtain a warrant based on probable cause where an individual is unconscious, as this Court has previously noted. *Id.* at 2184–85. And an officer may conduct blood draws without a warrant where she has probable cause to believe that an individual was driving under the influence and exigent circumstances preclude obtaining a warrant in a timely fashion.

ARGUMENT

I. A BLOOD TEST IS AN INVASIVE BODILY SEARCH THAT PRESUMPTIVELY REQUIRES A WARRANT.

"[T]he taking of a blood sample . . . is a search." *Birchfield*, 136 S. Ct. at 2173. A blood draw is a physical intrusion into a person's body that requires using a needle to pierce the skin, locate and puncture a vein, and extract a part of the person's bodily fluids. *Id.* at 2178; *Missouri v. McNeely*, 569 U.S. 141, 148 (2013). A bodily intrusion without consent, even if it does not cause physical harm or put a person at medical risk, invades "an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 569 U.S. at 148 (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)). For some, blood tests raise issues of "fear, concern for health, or religious scruple." *See Schmerber v. California*, 384 U.S. 757, 771 (1966). And "[s]ome individuals have compelling medical reasons for refusing blood draws, such as hemophilia or ongoing anticoagulant therapy." Jacob M. Appel, *Nonconsensual Blood*

Draws and Dual Loyalty: When Bodily Integrity Conflicts with the Public Health, 17 J. Health Care L. & Pol'y 129, 150 (2014).

A blood draw can also expose a vast amount of highly personal information far beyond Blood Alcohol Content (BAC). It "places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading." *Birchfield*, 136 S. Ct. at 2178. Blood tests "can reveal a host of private medical facts about [a person], including whether he or she is epileptic, pregnant, or diabetic" *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989). They can also reveal, for example, whether a person has a sexually transmitted disease, certain medications she is taking, her cholesterol level, and even her DNA.[2] Thus, "[e]ven if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested." *Birchfield*, 136 S. Ct. at 2178. Each of these concerns is just as salient for a person unconscious at the time of the invasion. *See United States v. Booker*, 728 F.3d

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[2] *See, e.g.*, Elizabeth Boskey, *STDs Detected By Blood Tests*, verywellhealth.com (Nov. 29, 2018), https://www.verywellhealth.com/can-i-get-an-std-blood-test-3132740 (explaining that blood tests can reveal whether someone has herpes, HIV, syphilis, and hepatitis B and C); *Common Lab Tests*, Cleveland Clinic Martin Health, https://www.martinhealth.org/common-lab-tests-mhs (last visited Feb. 20, 2019); Souvik Ghatak et al., *A simple method of genomic DNA extraction from human samples for PCR-RFLP analysis*, 24(4) J. Biomolecular Tech. 224–31 (2013).

535, 539–40 (6th Cir. 2013) (holding that defendant's Fourth Amendment rights were violated even though he was unconscious at the time of the search).

Because blood tests entail both an invasive bodily intrusion and potential exposure of vast amounts of private information, they presumptively require a warrant based on probable cause. *McNeely*, 569 U.S. at 148, 152. "The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great." *Schmerber*, 384 U.S. at 770.

II. AN UNCONSCIOUS PERSON CANNOT CONSENT TO A SEARCH.

Where an individual consents to a search, the government need not obtain a warrant or have probable cause. But consent must be "freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). "[T]he Fourth and Fourteenth Amendments require that [the state] demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." *Schneckloth*, 412 U.S. at 248–49.

An unconscious person cannot consent to a search. In order for consent to be voluntary, an individual must have the opportunity to make a *choice*, and an unconscious person lacks the ability to choose. Accordingly, this Court has recognized that consent cannot be given where "a person is unconscious or drugged or otherwise lacks capacity for conscious choice." *Id.* at 224.

The ability to make a free choice is essential to the Fourth Amendment doctrine of consent. Thus,

consent is invalid if it is "given only after the official conducting the search has asserted that he possesses a warrant." *Bumper*, 391 U.S. at 548. By claiming to have a warrant the officer "announces in effect that the occupant has *no right to resist* the search." *Id.* at 550 (emphasis added); *see also Amos v. United States*, 255 U.S. 313, 317 (1921) (holding that where officers demanded admission to search "under government authority," search was not conducted pursuant to voluntary consent).

Relatedly, the ability to change one's mind and resist the search by delimiting or revoking consent is integral to the very concept of voluntary consent. A person who consents to a search "may of course delimit as he chooses the scope of the search to which he consents." *Fla. v. Jimeno*, 500 U.S. 248, 252 (1991). An individual who grants consent to a search must, at any point up to the completion of the search, have the ability to withdraw or amend that consent. In *United States v. Ho*, for example, the defendant initially consented to a search of his person and portfolio, but during the search he "struggled to retrieve the portfolio." 94 F.3d 932, 934 (5th Cir. 1996). The court of appeals held that the officer could not "continue the warrantless search of Ho's portfolio" because "[a] consent which waives Fourth Amendment rights may be limited, qualified, or withdrawn." *Id.* at 934, 936 n.5. All courts of appeals to address the issue have recognized that consent to a search may be freely revoked or limited at any time before or during a search. *See United States v. Williams*, 898 F.3d 323, 329 (3d Cir. 2018), *cert. filed*, No. 18-7726 (Feb. 1, 2019) ("Relying on *Florida v. Jimeno*'s recognition that a consensual search may be restricted by individuals, our sister circuits that

have considered whether individuals may withdraw consent to search have unanimously answered in the affirmative. Today, we join them.").[3] Indeed, in this very case, the Wisconsin Supreme Court recognized that "[o]f course, consent voluntarily-given before a blood draw may be withdrawn with or without a statutory reminder." *State v. Mitchell*, 914 N.W.2d 151, 161 (Wis. 2018).

An unconscious person cannot deny, limit, or withdraw consent. Indeed, an unconscious person can make no choice at all, and therefore cannot be deemed to have consented to a search.

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[3] *See Williams*, 898 F.3d at 329; *United States v. Wilmore*, 57 F. App'x 949, 953 (3d Cir. 2003) (unpublished); *United States v. Ortiz*, 669 F.3d 439, 445 (4th Cir. 2012); *United States v. Ho*, 94 F.3d 932, 934 (5th Cir. 1996); *Painter v. Robertson*, 185 F.3d 557, 567 (6th Cir. 1999); *United States v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986); *United States v. Sanders*, 424 F.3d 768, 774, 782 (8th Cir. 2005); *United States v. McWeeney*, 454 F.3d 1030, 1034 (9th Cir. 2006); *United States v. Manjarrez*, 348 F.3d 881, 888 (10th Cir. 2003); *United States v. Terry*, 220 F. App'x 961, 964 (11th Cir. 2007) (per curium) (unpublished); *United States v. Carter*, 985 F.2d 1095, 1097 (D.C. Cir. 1993); *United States v. Pelle*, No. CRIM. 05-407 (JBS), 2006 WL 436920, at *4 (D.N.J. Feb. 17, 2006); *United States v. Cadieux*, 324 F. Supp. 2d 168, 170 (D. Me. 2004); *United States v. Bily*, 406 F. Supp. 726, 729 (E.D. Pa. 1975); *United States v. Caro*, No. 86 CR 646, 1987 WL 10839, at *4 (E.D.N.Y. Apr. 28, 1987), *aff'd*, 863 F.2d 46 (2d Cir. 1988); *Baxter v. State*, 77 P.3d 19, 25 (Alaska Ct. App. 2003); *Burton v. United States*, 657 A.2d 741, 746 (D.C. 1994); *State v. Yong Shik Won*, 372 P.3d 1065, 1079 (Haw. 2015), *as corrected* (Dec. 9, 2015); *Byars v. State*, 336 P.3d 939, 945 (Nev. 2014); *State v. Villarreal*, 475 S.W.3d 784, 799 (Tex. Crim. App. 2014); *State v. Dunkel*, 143 P.3d 290, 293–94 (Utah Ct. App. 2006); ; *McNair v. Commonwealth*, 521 S.E.2d 303, 307–08 (Va. Ct. App. 1999). .

III. IN MULTIPLE LEGAL DOMAINS, VALID CONSENT REQUIRES THAT THE INDIVIDUAL BE CAPABLE OF FREELY GIVING AND LIMITING OR WITHDRAWING CONSENT DURING THE COURSE OF THE CONSENTED-TO ACTIVITY.

Consent is an operative legal concept in many domains beyond the Fourth Amendment. Two points emerge from the treatment of consent in multiple contexts. First, it must be given by someone who is capable of making a choice. Second, where authority to act rests on consent, the individual who consented must be capable of limiting or revoking consent at any time before the act is completed. As a result, one cannot generally impute consent to an unconscious person, who, by definition, has no opportunity to change her mind.

This principle has perhaps its strongest application in the context of sexual relations, where the presence or absence of consent marks the difference between sexual assault or rape, on the one hand, and a lawful, consensual encounter on the other. "The law is well settled that a sleeping, unconscious, or incompetent person cannot consent." *United States v. Lopez*, No. 201400373, 2017 WL 193265, at *3 (N-M. Ct. Crim. App. 2017) (internal quotation marks omitted)). Indeed, the Uniform Code of Military Justice includes among those "incapable of consenting" a person "who is physically incapable of declining participation in, or communicating unwilling[n]ess to engage in, the sexual act at issue." 10 U.S.C. § 920(g)(8)(B).

Moreover, even where a conscious individual has consented in advance to have sexual relations while unconscious, the consent is deemed invalid once an individual loses consciousness, because she loses the ability to withdraw consent. In *People v. Dancy*, for example, the court held that "advance consent" is not a defense to the rape of an unconscious person. 124 Cal. Rptr. 2d 898, 911 (Cal. Ct. App. 2002). It reasoned that "[w]hile a woman may expressly or impliedly consent to *conscious* sexual intercourse in advance, she remains free to withdraw that consent, and ordinarily has the ability to do so since she is conscious." *Id.* The situation is categorically different when the woman has become unconscious, however, because she can no longer make a choice. Thus, "[e]ven if a woman expressly or impliedly indicates in advance that she is willing to engage in *unconscious* sexual intercourse, a man who thereafter has intercourse with her while she is unconscious necessarily deprives her of the opportunity to indicate her lack of consent. . . . [T]he woman's lack of consciousness absolutely precludes her from making her lack of consent known at the time of the act." *Id.*; *see also United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2011) (rejecting argument in sexual assault case that "consent given before a victim became substantially incapable continues to be valid throughout the period of incapacity").[4]

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[4] A recent viral video addressing the issue of consent in the sexual relations context underscores the point. In the video, which uses tea as a stand-in for sex, the narrator says: "Maybe they were conscious when you asked them if they wanted tea, and they said 'yes.' But in the time it took you to boil the kettle, brew the tea and add the milk, they are now unconscious. Don't

Many other legal doctrines similarly recognize the principle that, where the authority to take an action vis-à-vis an individual rests on his consent, he must have the choice to withdraw consent. Under the Fifth Amendment, for example, a suspect who has voluntarily consented to waive his *Miranda* rights can revoke his waiver at any time. "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda v. Arizona*, 384 U.S. 436, 473–74 (1966).

Similarly, a subject who consents to share personal medical information by participating in a research study must be able to withdraw that consent. *See, e.g.*, 45 C.F.R. § 46.116(b)(8) (informed consent to participate in a research study requires that "the subject may discontinue participation at any time"); *see also* 45 C.F.R. § 164.508(b)(5) (HIPAA privacy rules require that "[a]n individual may revoke an authorization [for the use or disclosure of protected health information] provided under this section at any time").

The right to informed consent to medical treatment also includes the right to revoke consent. Medical "[c]onsent must be freely given and can be

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make them drink the tea. They said 'yes' then, sure, but unconscious people don't want tea." Deirdra O'Regan, *The Very British Video Helping Americans Understand Sexual Consent*, Wash. Post (June 10, 2016), https://www.washingtonpost.com/news/worldviews/wp/2016/06/10/the-very-british-video-helping-americans-understand-sexual-consent/?utm_term=.3fc60ec07cc2.

freely withdrawn at any time." Timothy J. Paterick et al., *Medical Informed Consent: General Considerations for Physicians*, 83(3) Mayo Clinic Proc. 313, 317 (2008). The right to withdraw consent is "a standard component of every informed consent protocol," and includes the right to withdraw consent at any time before or *during* a procedure. Claudine Yee et al., *Putting the "No" in Non Nocere: Surgery, Anesthesia, and a Patient's Right to Withdraw Consent*, R.I Med. J., Oct. 2017, at 38, 38.

Federal law recognizes that a parent can withdraw consent at any time to a school district's disclosure of a child's personally identifiable information. 34 C.F.R. § 300.154(d)(2)(v)(C); *see also* 20 U.S.C. § 7908(a)(2)(A) (providing that a student's parent can opt out of affording consent to a local education agency giving information about the student to a military recruiter or an institution of higher education). Federal law also recognizes that parents retain the right to revoke consent to their child's participation in certain educational instruction. *See* 34 C.F.R. § 300.300(b)(4) (granting that if a parent revokes consent to the continued provision of special education and related services the public agency may not continue to provide these services); 20 U.S.C. § 6312(3)(A)(viii)(I) (providing that parents of an English learner have the right to have their child immediately removed from a language instruction educational program upon their request).

Under property law, one who "remains on the land" after an owner withdraws his consent to enter the property is liable for trespass. Restatement (Second) of Torts §§ 158, 171 (Am. Law Inst. 1965).

Similarly, "[e]ven if consent is initially given, a plaintiff can state a claim for failure to restore things wrongfully acquired under [Cal. Civ. Code] § 1712 if the plaintiff later withdraws consent." *Snyder & Assocs. Acquisitions LLC v. United States*, 859 F.3d 1152, 1161 (9th Cir.), *opinion amended on reh'g*, 868 F.3d 1048 (9th Cir. 2017).

The right to revoke consent is also an important component of mediation and settlements. Under California law, for example, "unless the parties have agreed to a binding award, any party who voluntarily enters mediation may revoke its consent and withdraw from the dispute resolution process." *Jeld-Wen, Inc. v. Superior Court*, 53 Cal. Rptr. 3d 115, 118 (Cal. Ct. App. 2007); *see also Model Standards of Conduct for Mediators* Standard I(A) (Am. Arbitration Ass'n, Am. Bar Ass'n & Ass'n for Conflict Resolution 2005) (providing that "[p]arties may exercise self-determination at any stage of a mediation, including . . . withdrawal from the process"). Similarly, "[a] party may revoke his consent to settle a case anytime before judgment is rendered." *Samples Exterminators v. Samples*, 640 S.W.2d 873, 874–75 (Tex. 1982) (internal citation omitted); *see also Rodriguez v. Rodriguez*, 29 S.E.2d 901, 905 (N.C. 1944) (holding judgment was void because before the settlement was signed by the judge one party "withdrew her consent").

The rules governing professional responsibility for lawyers also recognize the principle that where consent is the basis for acting, the individual must have the right to change her mind. Thus, ABA Model Rule of Professional Responsibility 1.7 provides that a client may consent to the "existence of a concurrent

conflict," but Comment 21 makes clear that "[a] client who has given consent to a conflict may revoke the consent." *Model Rules of Prof'l Conduct* r. 1.7 (Am. Bar Ass'n 2018). Similarly, a client can consent to a "lawyer's reporting of information concerning abuse or mistreatment; however, the client is entitled to withdraw such consent thereafter." N.Y. City Bar Ass'n, Formal Opinion 1997-2 (1997).

Across all of these very different legal regimes, where the authority to act rests upon an individual's consent, the law recognizes both that the consent must be voluntary, and that the individual must retain the authority to change her mind and revoke or limit consent.

There are, of course, rare situations where conscious individuals can consent to particular actions after they lose consciousness. Thus, individuals can consent in advance to donate their organs if they are killed in an accident, or can sign "do not resuscitate" directives designed to govern when they are no longer able to make a conscious choice. A patient can provide advance consent to a surgical procedure to be conducted under general anesthesia.[5] But while there are a limited number of

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[5] As this Court has recognized, there is a constitutionally significant difference between surgery under general anesthesia pursuant to informed consent and that imposed by government edict. "When conducted with the consent of the patient, surgery requiring general anesthesia is not necessarily demeaning or intrusive. In such a case, the surgeon is carrying out the patient's own will concerning the patient's body and the patient's right to privacy is therefore preserved." *Winston*, 470 U.S. at 765. But where the same surgery is done at the direction of the government to search beneath a person's skin for

settings in which individuals may expressly consent in advance to certain actions being taken when they lose the ability to make a choice, states surely cannot impute such a "choice" to anyone, much less to everyone who drives a car within the state.

As demonstrated below, the state's ability to impute "consent" must at a minimum be limited to situations in which individuals retain the freedom to choose to revoke consent.

IV. STATES MAY NOT IMPUTE "CONSENT" TO SEARCH TO AN UNCONSCIOUS PERSON.

A plurality of the Wisconsin Supreme Court concluded that, by the terms of a Wisconsin statute, Mitchell was on notice that he could be subjected to a warrantless BAC search if he were found unconscious and an officer had probable cause to believe he had been driving under the influence—even where, as here, he was found not driving a car but walking on a beach. *Mitchell*, 914 N.W.2d at 154, 166–67. Wisconsin calls this "implied consent," but that is a misnomer. Wisconsin law simply imposes a presumption by law that every motorist has "consented" to this arrangement by driving on its roads.

As a matter of regulating motor vehicles, it may be permissible to impose civil sanctions on those

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evidence of a crime, it "involves a virtually total divestment of [the person's] ordinary control," and imposes upon his "most personal and deep-rooted expectations of privacy." *Id.* at 760, 765.

who refuse a BAC test. *See Birchfield*, 136 S. Ct. at 2185. The distinct Fourth Amendment question of whether an individual has actually consented to a particular search, however, requires a "totality of all the circumstances" case-by-case inquiry, *Schneckloth*, 412 U.S. at 227, and therefore cannot be determined by a state law presumption. A statutory imputation of "consent" may be a relevant factor to consider in determining whether, under the totality of the circumstances, an individual who is conscious has in fact consented to a search. But where the individual being searched is unconscious and incapable of making a choice (or changing her mind), she cannot be said to have consented in any meaningful sense.

All 50 states have "implied consent" statutes that impose administrative consequences, such as license revocation, if a driver refuses to take a BAC test. *See* Nat. Highway Traffic Safety Admin., *Digest of Impaired Driving and Selected Beverage Control Laws* (30th ed. 2017) (current as of Dec. 31, 2015). Virtually all such statutes recognize, however, that individuals may change their minds and refuse consent at the time of the search, subject to certain consequences.[6] That recognition is consistent with

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[6] *See, e.g.*, Wis. Stat. Ann. § 343.305(4) (requiring driver be given a warning "[a]t the time that a chemical test specimen is requested" that "[i]f you refuse to take any test that this agency requests, your operating privilege will be revoked and you will be subject to other penalties. The test results or the fact that you refused testing can be used against you in court."); Mo. Ann. Stat. § 577.041(2) (providing that a person who was operating a vehicle "shall further be informed that his or her license shall be immediately revoked upon refusal to take the test"); Cal. Veh. Code § 23612(a)(1)(D) ("The person shall also be told that his or her failure to submit to, or the failure to

the Fourth Amendment, which requires that the opportunity to refuse consent is necessary for consent to a search to be voluntary. As one state court explained, "[i]f an individual is subsequently stopped and read the implied consent advisory, the driver has the *choice* at that point whether to withdraw or ratify the consent." *McCoy v. N. Dakota Dep't of Transp.*, 848 N.W.2d 659, 668 (N.D. 2014) (emphasis added); *see also McNeely*, 569 U.S. at 161 (recognizing that "[s]uch laws impose significant consequences when a motorist *withdraws* consent" (emphasis added)).

While this Court has not yet squarely addressed their validity, it has in dicta approved of statutes that impose civil consequences on those who refuse a BAC blood draw. *Birchfield*, 136 S. Ct. at 2185; *McNeely*, 569 U.S. at 161 (plurality opinion).

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complete, the required breath, blood, or urine tests will result in" administrative consequences). A federal "implied consent" statute that applies to drivers in the special maritime and territorial jurisdiction also recognizes that a driver may "refuse[] to submit to such a test or tests" and face administrative and evidentiary consequences. 18 U.S.C. § 3118(b).

Puerto Rico mandates chemical testing even where a person "refuses, objects, resists or evades submitting to the alcohol, drug or controlled substance testing procedure," and provides that "he/she shall be arrested in order to be transferred to a medical-hospital facility for the personnel certified by the Department of Health to proceed to extract the pertinent samples." P.R. Laws Ann. Tit. 9, § 5209(a). Additionally, in the limited circumstance of "serious bodily injury or death," a person under arrest in Wyoming cannot refuse to submit to a chemical test. Wyo. Stat. Ann. § 31-6-102(d). The constitutionality of these outlier statutes has not been squarely tested.

When applied to conscious drivers, such statutes preserve the freedom to revoke consent—which, as we have seen above, is essential to make consent truly voluntary. Indeed, the very fact that these statutes specify consequences for saying "no" necessarily acknowledges the individual's right to refuse. *Cf. Aviles v. Texas*, 571 U.S. 1119 (2014) (order vacating and remanding for further consideration in light of *McNeely* a court's determination that, despite the driver's refusal, a warrantless blood draw based on an implied consent statute did not violate the Fourth Amendment); *Aviles v. State*, 443 S.W.3d 291, 294 (Tex. App. 2014) (explaining on remand that the "mandatory blood draw statute and the implied consent statute . . . clearly create categorical or per se rules the *McNeely* court held were not permissible exceptions to the Fourth Amendment's warrant requirement").

Birchfield held that there are Fourth Amendment limits to the consequences a state can impose for withdrawing consent. In particular, "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Birchfield*, 136 S. Ct. at 2186. Criminal consequences, the Court reasoned, are inconsistent with the notion of voluntary consent. *Id.* If the government cannot *constrain* an individual's free choice to consent to a search by imposing criminal penalties, it also cannot impute consent where the individual has *no ability* to choose whatsoever. The choice does not have to "be an easy or pleasant one for a suspect to make," *S. Dakota v. Neville*, 459 U.S. 553, 564 (1983), but as a Fourth Amendment matter, there must be a choice. And an unconscious person has no ability to choose.

Wisconsin suggests that it is the driver's own fault if he is unconscious. Br. in Opp. 16–17. But a person may be unconscious for reasons having nothing to do with intoxication. He may have been injured in a car accident, suffered a seizure or stroke, or fainted or choked. And even if an individual is unconscious by his own voluntary actions, that does not amount to consent to a search. That a person is unconscious—irrespective of the cause—cannot justify depriving him or her of the opportunity to withdraw consent.

Wisconsin maintains that a BAC blood draw furthers a "vital government interest" in a "serious area." Br. in Opp. 19. Deterring driving while intoxicated is indisputably an important government interest. *See, e.g., Birchfield*, 136 S. Ct. at 2166, 2178–79. But the gravity of the state interest has no bearing on the voluntariness of an individual's consent to a search. There are not different consent standards for searches aimed at detecting murderers on the one hand and shoplifters on the other.

Moreover, the consequences of accepting Wisconsin's "vital government interest" argument would be draconian. States also have a vital interest in deterring speeding and texting while driving, but surely Wisconsin could not impute consent to warrantless searches of cellphones or GPS devices as a condition of driving on the road, without at least affording a right to withdraw such consent. *Cf. Riley v. California*, 134 S. Ct. 2473, 2495 (2014) ("Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant."); *United States v. Jones*, 565 U.S. 400, 430 (2012) (Alito, J.,

concurring) ("[T]he use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy . . . [and] where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant").

V. STATES HAVE ADEQUATE MEANS TO DETER AND PROSECUTE DRUNK DRIVING WITHOUT IMPUTING CONSENT TO UNCONSCIOUS MOTORISTS.

In *Birchfield*, the Court considered the fact that a blood test, but not a breath test, could be administered on "a person who is unconscious (perhaps as a result of a crash)" but explained that when such situations arise "the police may apply for a warrant if need be." 136 S. Ct. at 2184–85. That remains true today. Wisconsin points to no substantial change in the less than three years since *Birchfield* was decided that should make this Court rethink its conclusion that an officer who has probable cause to believe an unconscious driver is intoxicated must obtain a warrant.

And as with any other search, a BAC blood test may be procured where the officer has probable cause and exigent circumstances in a particular case preclude obtaining a warrant in a timely fashion. *McNeely*, 569 U.S. at 156 ("[E]xigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application process"); *see Schmerber*, 384 U.S. at 770–71 (applying exigent

circumstances test and concluding that warrantless blood test was constitutional). This exigent circumstances exception applies equally when someone is unconscious.

If there is probable cause that a motorist was driving while intoxicated, the state will generally be able to obtain evidence of that criminal offense, either pursuant to a warrant or under the exigent circumstances exception, where appropriate. These options give the state sufficient means to ensure that driving under the influence can be prosecuted and deterred.

CONCLUSION

For the reasons stated above, the judgment of the Supreme Court of Wisconsin should be reversed.

Respectfully Submitted,

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